

## **EPA'S SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY**

### **Questions and Answers for the Practitioner**

**January 1999**

#### **A. Nature of the Policy**

1. Q. *What is the Supplemental Environmental Projects (SEP) Policy?*

A. EPA's SEP Policy encourages the use of environmentally beneficial projects as part of the settlement of an enforcement action. Through SEPs, the settlement of an enforcement action can result in environmental and public health protections beyond that specifically required by law.

The SEP Policy provides criteria to guide when and how SEPs may be included as part of a settlement.

2. Q. *How do SEPs relate to penalties?*

A. SEPs do not replace or substitute for penalty dollars. In all enforcement actions, EPA seeks to obtain an appropriate penalty considering a variety of factors, such as the economic benefit gained by the violator and the seriousness of the violation. EPA also considers a defendant's commitment and ability to perform a SEP as a relevant factor in establishing an appropriate penalty. The final settlement penalty generally will be lower for a violator who agrees to perform an acceptable SEP compared to a violator who does not agree to perform a SEP.

3. Q. *How does the SEP Policy promote the Agency's program goals?*

A. SEPs can secure environmental or public health protection and improvements in addition to those achieved by compliance with applicable laws. SEPs can also further Agency goals such as pollution prevention and environmental justice. For example,

SEPs involving pollution prevention are preferred over those calling for pollution reduction or control strategies. The Policy also encourages use of SEPs in communities where environmental justice concerns are present.

## **B. Applicability and Use**

1. Q. *When would it not be appropriate to use the SEP Policy?*
  - A. A SEP is not necessarily appropriate for every case. A defendant may not have adequate resources or expertise to execute a viable SEP. Where resources are limited, it may be more appropriate to focus the defendant's efforts on injunctive relief. Importantly, a SEP that has no nexus to a violation is not appropriate, no matter how good a SEP it might appear to be. (See Question D.1 below for an explanation of nexus.)
2. Q. *Can a non-profit organization obtain funding through the SEP Policy?*
  - A. The SEP Policy is used only in connection with settlement of an enforcement action. All monies used to perform a SEP project come from the violator. The Agency does not maintain a "SEP Fund" from which it issues grants. Non-profit organizations may act as contractors for the defendant in performing a SEP, but the SEP Policy itself is an enforcement tool, not a way for organizations to obtain federal money for worthwhile projects.
3. Q. *The Regional Media Program Office has a great project idea that will significantly benefit the community. It is looking for a case through which to get this project funded. Should I, as the Regional Attorney on a case, be concerned about proposing this as a SEP to the defendant? What if the defendant has not asked for information on SEPs and is willing to pay the entire penalty amount?*
  - A. SEPs must be voluntary actions undertaken by the violator. If a defendant expresses an interest in doing a SEP, it is appropriate to suggest possible projects. It is also appropriate to inform a defendant

about the SEP Policy. However, it would be inappropriate for the Agency to pressure a defendant to undertake a SEP.

4. Q. *Can I use a SEP to mitigate the stipulated penalties?*

A. Only in extraordinary circumstances. Stipulated penalties provide a significant incentive for compliance with the consent agreement. If a violator cannot honor the terms of the consent agreement, there may be little reason to believe the violator capable of honoring the commitment to perform a SEP. However, in some circumstances the violator may be able to demonstrate its ability and intention to perform a SEP, and the reasons for noncompliance with the agreement may be such that performance of a SEP would not undermine the deterrent purposes of stipulated penalties. Even under these circumstances, the settlement agreement must have established stipulated penalty liability as a range of possible values for the violations at issue. Ranges for stipulated penalties, however, can diminish the deterrence value, and so should be used with discretion.

## C. Definition and Characteristics of a SEP

### Environmentally Beneficial

1. Q. *The defendant wants to purchase computers and set them up in a local library to provide community access to environmental Internet sites. Is this an acceptable SEP?*

A. No. This project provides no direct benefit to public health or the environment. Greater access to technology may be of some indirect benefit to the environment or public health by increasing community access to government processes such as permitting decisions. However, such benefit is too tenuous to provide any quantifiable value for which we could provide SEP credit.

In Settlement of an Enforcement Action

2. Q. *At the time of the inspection, Company Z had been working on developing a new process design that would eliminate 20% of its waste stream. Company Z proposes to implement its new design for SEP credit. Would this be considered a project done “in settlement of an enforcement action?”*

A. No. This project was contemplated by the company prior to the enforcement action. It is something that the company would do anyway, and therefore no additional benefit to the environment would be achieved by providing SEP credit for the project.

3. Q. *The defendant wants to perform a SEP that would allow a non-profit organization to continue its environmental assessment work. Apart from any other provisions of the SEP Policy that might apply, would this be a SEP done in “settlement of an enforcement action”?*

A. Not if the money was being used to extend the existing work. Under that circumstance, the activity would be done without the incentive of the enforcement action. The Agency would achieve no additional benefit to the environment by providing SEP credit for this project. If the money was going to perform a new, different assessment, then it may be appropriate.

Not Otherwise Legally Required to Perform (or likely to be required to perform as injunctive relief)

4. Q. *Defendant G will become subject to stricter air emissions standards in three years. It proposes a SEP that will bring it into compliance with the new air standards in two years. Is this an acceptable SEP?*

A. No. The SEP Policy states that it is appropriate to provide SEP credit for accelerated performance if it will result in compliance two or more years earlier than legally required. Under the above scenario, compliance is accelerated only by one year. Because the value of accelerated compliance is only the cost attributable to doing the project earlier (not the cost the project as a whole) the value of accelerated compliance only becomes significant when longer time frames are involved.

5. Q. *In a Clean Air Act enforcement action, the defendant proposes to make various changes to its environmental management system. These changes include providing more personnel to deal with environmental issues directly at the production units, developing procedures, informal audits and training to ensure compliance, developing a tracking system for better environmental monitoring of production units. Is this an acceptable SEP?*

A. No. These are actions which go to ensuring basic compliance with the law. As such, these activities could be included in the consent agreement as injunctive relief.

#### **D. Legal Guidelines**

##### Jurisdictional Requirement: Nexus

1. Q. *What is nexus?*

A. Nexus refers to the relationship between the violation and the proposed project. It provides the jurisdictional basis for a court to uphold agency settlements and approve consent decrees that settle civil penalty enforcement actions with a SEP even though the statute upon which the action is based does not specifically authorize such a remedy.

2. Q. *Can nexus be waived?*

A. No. As a legal requirement, rather than a policy consideration, nexus is a mandatory component for a SEP.

3. Q. *Defendant is about to close the facility where the violations occurred. Can the company perform a SEP at another facility that is twenty miles away? What if the other facility is three hundred miles away in another state?*

A. Geography alone does not create nexus. While nexus may be easier to establish where the impact of a project is in the same ecosystem or geographic area as where the violation occurred, that alone will not provide the kind of relationship necessary for nexus.

Nexus requires that the impact of the project be felt one of three ways:

- 1) by reducing the likelihood of similar violations;
- 2) by reducing the adverse impact to public health or the environment to which the violation contributed; or
- 3) by reducing the overall risk to public health or the environment potentially affected by the violation.

In other words, there must be some connection between the SEP and the kinds of concerns addressed by the statute or statutes that were violated. Therefore, a project three hundred miles away, that would reduce the likelihood that the defendant would have similar violations in the future, may have nexus. A project twenty miles away might not have nexus if, for example, it did not address any of the threats to public health or the environment potentially created by the violation.

#### Legal Limitations Related to EPA's Management of SEP Funds

4. Q. *Why is it important for EPA not to manage SEP money?*
  - A. It is important for EPA not to manage SEP money, because it might be considered money due to the federal treasury under the Miscellaneous Receipts Act. EPA must avoid even the appearance of controlling SEP money.
5. Q. *We are under a tight deadline to settle a case and the defendant wants to do a SEP. Can we set up a trust and decide on the SEP later?*
  - A. No. The amount of credit given to a project is based on the cost of the project and the environmental benefit that will result from the project. Without knowing what the project is, we cannot value the cost of the SEP for mitigation purposes. Furthermore, this places a continuing burden on the Agency to keep negotiating even after a consent decree has been "finalized." Failure to agree on a SEP after signing further complicates execution of the decree.
6. Q. *The defendant is going to perform a large and costly SEP that will take several years to complete. Can we set up a trust or escrow account and have the defendant fund it over time?*

- A. Yes. As long as the consent decree contains a commitment to perform a specific project (with an accompanying workplan) and specifies safeguards on the use of the fund so that the money will actually go toward the project, the project can be paid for through a trust or account that is funded over time.
7. Q. *The defendant wants to perform a SEP using a non-profit organization that obtains money through federal grants. Is this a problem?*
- A. As long as the SEP is different from the project for which the organization received the grant, there is no obstacle to using a non-profit organization as the contractor on a SEP.
8. Q. *What does the SEP Policy mean when it says that a project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress appropriated funds?*
- A. Attorneys must use a common sense approach to determining the scope of a project for which Congress has appropriated funds. For example, if Congress has appropriated funds to dredge a particular river, this prohibition would not prevent a defendant from dredging a tributary of that river.

## **E. Categories of SEPs**

### Project Examples

1. Q. *The defendant has proposed a SEP that would set up a lead poisoning screening program in the community adjacent to the facility. The defendant's violations involve off-site releases of organic pollutants to a river at a point downstream from the community.*
- A. While a worthwhile project, this would not meet the definition of a public health SEP. A public health SEP must be addressed to the population that was harmed or put at risk by the violation. Even though this hypothetical project would address the population next to the facility, that is not the population that was harmed by the violations in this example.

2. Q. *Injunctive relief in an action involves wetlands restoration. Defendant proposes to reserve land as a buffer around the wetland, and build an interpretive center (benches, kiosk, trails) to accompany the land restoration. Is this acceptable?*
- A. The buffer around the wetlands restoration is an acceptable SEP. Buffers provide additional environmental protection for the wetlands restoration. If the interpretive center is incidental to the overall buffer project, some amount of SEP credit may be allowed. However, the interpretive center could not stand alone as a SEP project. Its purpose is general public education which, while useful, provides no direct supplemental environmental benefit.
3. Q. *Defendant proposes to donate land for wetlands restoration. However, the defendant is a municipality and cannot easily purchase land. It proposes to give money to the Nature Conservancy, and earmark the money for the purpose of purchasing and managing the preservation of wetlands in a particular area. Is this acceptable?*
- A. The violator must remain responsible for the transfer of the land to the Nature Conservancy. The following language provides guidance on how such a SEP might be provided for in a consent agreement:
1. Violator shall contract with an appropriate entity, such as the Nature Conservancy, such that the following tasks are completed by the indicated dates:
    - a. Identify particular plots of land that are consistent with the specifications in paragraph xx of the consent decree by [date].
    - b. Submit the lists of possible plots with a recommended selection for EPA's review and approval by [date].
    - c. Develop legal options for protecting the land in perpetuity [or some specified period, e.g., 50 years], such as conservation easements, and provide EPA with a proposal for how the land will be purchased and protected by [date].



- d. Purchase the land with all applicable legal protections in place by [date].
- e. Establish options for maintaining the land in its protected state by [date] and submit to EPA for approval.
- f. Implement the selected option for maintaining the land [this might be transfer to the Nature Conservancy] by [date].

4. Q. *Are environmental management system development projects acceptable SEPs? What if the defendant agrees to implement the project?*

A. Generally, no. EMS projects, while once allowed under the SEP Policy, are no longer a routine category of SEP. Experience proved that EMS SEPs were difficult to value, as it was difficult to distinguish those elements that related to compliance from those activities which achieved a supplemental benefit beyond compliance. Even with a commitment to implement the program, it is would be difficult to evaluate just what benefit the environment would be receiving and to establish appropriate credit. However, should a defendant propose what the Region considers to be a particularly good EMS project, it might be possible to obtain HQ approval under the “other” category of SEPs.

5. Q. *A defendant wants to perform a SEP that would involve studying the air quality in the airshed to which its facility contributes. Does this qualify as an environmental quality assessment?*

A. Yes, provided that the defendant’s assessment in not confined solely to its own releases.

6. Q. *The defendant, a municipality, proposes to do an environmental assessment of a piece of land it owns through a tax foreclosure. The land was a former shopping center and contained a gasoline station. No one will develop the land because of fears of environmental contamination. The city hopes that by doing the environmental assessment itself, it can encourage development of the property. Is this an acceptable SEP?*

A. Yes, provided: 1) that the site does not qualify for remedial investigation or action under CERCLA, RCRA, the CWA or any other federal law ; 2) that the site is not eligible for or receiving

funds under the Agency's Brownfields program; and 3) that defendant donates the land rather than sells it for a profit after cleanup.

7. Q. *The defendant is a city. It wants to provide additional training to its various agency employees on better environmental compliance with the violated statute. Does this qualify?*
- A. No. For it to be an acceptable compliance assistance SEP, the training must be provided to others in the regulated community, not to the defendant itself. The defendant has an obligation to know the law; compliance training for the defendant is something that could be obtained as injunctive relief and would not provide any supplemental benefit.
8. Q. *The defendant wants to provide emergency response equipment to local emergency response authorities. The complaint cites disposal of hazardous waste without a permit and violation of several tracking requirements for land disposal of hazardous waste. Is this SEP approvable?*
- A. No. This type of emergency planning SEP is acceptable only where there are violations of EPCRA, or reporting violations under CERCLA § 103 or CAA § 112(r), or violations of other emergency planning, spill or release requirements alleged in the complaint.

#### Projects Not Acceptable as SEPs

9. Q. *In settlement of a case involving plastic toys containing misleading pesticide labeling, the defendant proposes to publish ads in parenting and child care magazines providing information about protecting children from lead-based paint. Is this an acceptable SEP?*
- A. No. This project is not directed at the regulated community but is providing general public education. General public education projects do not meet the definition of a SEP because they do not result in any direct environmental benefit.
10. Q. *Defendant in a FIFRA action proposes to set up a worker protection and public education program to inform workers and the public about pesticide misuse. Is this an acceptable SEP?*

A. Only if the violations were by applicators. Otherwise, the project would only be providing general public education.

12. Q. *Defendant proposes to give money to a non-profit organization which researches air quality of the Smoky Mountains. Is this an acceptable SEP?*

A. No. Money for studies and assessments, without a requirement to address the problems identified, do not qualify. Such studies, by themselves, do not provide any additional environmental benefit.

13. Q. *The community has complained that it does not have access to information that allows it to participate in environmental decisions. The defendant proposes to set up a technology center in a local library, consisting of a computer and manual, that will allow the community Internet access to environmental web sites. Is this an acceptable SEP?*

A. No. This project is unrelated to environmental protection. Any benefit to the environment would be indirect at best. It is in the nature of making a contribution to a non-profit organization or donating playground equipment.

14. Q. *Defendant who violated Clean Air Act provisions related to methanol, proposes to give school district money to buy natural gas powered buses. Is this an acceptable SEP?*

A. Not in this form. Contributions of money are not acceptable SEPs. When performance is by a third party, there is no way to guarantee that the money will actually be spent on the intended project. There must be an obligation by the defendant to perform. In this case, the defendant could be responsible for purchasing the buses and then donating them to the school district.

## **F. Calculation of the Final Penalty**

1. Q. *In calculating what the settlement amount would be without the SEP, can I take into account the gravity mitigation factors in the applicable Penalty Policy?*

A. Yes. Calculation of the penalty without the SEP should reflect the bottom-line penalty you would be willing to settle for if the

defendant did not perform a SEP. This calculation should be done by applying all appropriate factors in accordance with the applicable penalty policy.

2. Q. *Are there circumstances when it would be permissible for the settlement not to meet the minimum cash penalty amount of BEN + ten percent or twenty-five percent of gravity?*

A. Generally, no. It is important to preserve the deterrent value of the penalty. However, the Agency will consider approving de minimis deviations on a case-by-case basis.

3. Q. *In an administrative action, a respondent proposes to substitute water-based lacquer for solvent-based lacquer in its process. It involves purchase of a new spray gun, and production loss due to its installation. The water-based lacquer will also cost more than the solvent-based. How much of this can be included in the cost of the SEP?*

A. The cost of the spray gun, the lost profits due to installation of the new equipment and the increased cost of the new lacquer can all be credited. It is important to remember, however, that offsetting benefits must also be considered, such as reduced disposal costs to the defendant.

4. Q. *Can the defendant claim credit for employee time spent presenting a compliance assistance project?*

A. Yes, we can credit that employee's time, i.e., the lost opportunity to the company of that employee's time. It would be appropriate to credit the full cost, the hourly pay rate plus the cost of taxes and benefits. It will be important to obtain a realistic estimate from the defendant of how many work hours the employee will spend and then provide in the consent decree for verification of the actual hours spent.

5. Q. *Defendant wants to donate property to the state to be used as a preserve. Defendant asserts that the value of the property should include the indirect benefits that the public will receive from the project, and has used an approach similar to how natural resource damages are calculated. How should the property be valued for SEP credit purposes?*

- A. The value of the land for SEP credit should be the fair market value, a valuation of what the defendant is giving up. The benefits to the public are taken into account when determining the quality of the SEP to establish a mitigation percentage.

6. Q. *I have given 100% SEP credit to my municipal defendant for its SEP. Does this mean that I don't need to assess a penalty?*

- A. No. SEP credit does not eliminate the need to recover a deterrent level penalty (BEN + 10% or 25% of gravity). One hundred percent mitigation merely means giving dollar for dollar credit towards the penalty for the cost of the project.

#### **F. Liability for Performance**

1. Q. *Can a violator do a SEP simply by giving funds to someone else (e.g., a state agency or charity) and let that entity perform the environmental project?*

- A. No. SEP credit is given to specific projects because they will achieve specific environmental results. There is no guarantee under this scenario that the money will be used for the project envisioned and no way to compel performance because the consent decree has no authority to bind the third-party.

#### **G. Penalties**

1. Q. *We have doubts about the defendant's valuation of the project. If they don't spend as much as they claim they will, can we provide in the consent decree that we will recoup the difference between what they spent and the bottom-line penalty?*

- A. The consent decree should provide for stipulated penalties in the event the defendant spends less than 90% of the estimated SEP cost. The stipulated penalty should be a specific dollar amount, between 75 and 150 percent of the amount by which the settlement penalty was mitigated on account of the SEP. It should **not** be stated as the difference between the 90% SEP cost amount (10 percent is the amount of difference we allow between the estimated SEP cost and the cost of satisfactorily completing the SEP) and what would have been our bottom-line penalty in the absence of the SEP. The latter approach assumes we gave dollar-for-dollar credit for the SEP, which generally will not have been the case.

2. Q. *Defendant does not want to pay stipulated penalties if the project does not meet the estimated costs. It wants the option of performing another SEP.*
- A. The option of performing another SEP is possible only if the second project is specifically identified and provided for in the consent decree. We do not want to be in the position of renegotiating the consent decree.
3. Q. *Defendant wants to have disputes over whether the SEP has been satisfactorily performed turned over to dispute resolution. Is there any reason not to do this?*
- A. Using dispute resolution is a reasonable approach for civil judicial cases. It would not be appropriate for administrative cases, where we do not provide for dispute resolution.

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